

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

United States of America,

Plaintiff

v.

Michael Kroger,

Defendant

Case No.: 2:13-cr-00232-JAD-VCF-2

**Order Denying Motion for Compassionate
Release and Granting Motion to Seal**

[ECF Nos. 183, 186]

Michael Kroger is serving a 20-month sentence at Federal Correctional Institution Mendota (FCI Mendota) for conspiracy to commit mail fraud and wire fraud.¹ He now moves for compassionate release because he is 61 years old and suffers from chronic obstructive pulmonary disease (COPD), an unspecified mood disorder, and atherosclerosis, all of which put him at a greater physical risk for COVID-19.² The government opposes the motion, arguing that Kroger has failed to prove he has COPD and had, at the time of filing, only served a fourth of his sentence.³ Though I am sympathetic to Kroger's conditions and the challenges of incarceration during a pandemic, after considering his ailments and the relevant factors under 18 U.S.C. § 3553(a), I deny his motion because a reduction of his already reduced sentence is unwarranted.

Background

Last year, Kroger pled guilty, without a plea agreement, to one count of conspiracy to commit mail fraud and wire fraud.⁴ Kroger's underlying offense involved a several-year scheme in which he and others contacted timeshare owners, tricked them into thinking that he had a

¹ 18 U.S.C. § 1349.

² ECF No. 183 (motion for compassionate release).

³ ECF No. 185 (response).

⁴ ECF No 171 at 1.

1 buyer for their property, and negotiated a fee for alerting the owners of the fictitious buyer. At
2 sentencing, I noted that he stole nearly \$800,000 from approximately a thousand victims. But
3 given Kroger's limited criminal history, his success for six years on pretrial supervision, his role
4 in the scheme, his age, and the crime's non-violent nature, I sentenced him to 20 months
5 imprisonment.

6 When he filed this motion, Kroger had served only four months of his sentence.⁵ He is
7 61 years old and suffers from COPD, an unspecified mood disorder, and atherosclerosis. Kroger
8 seeks an order releasing him from prison and reducing his sentence to time served, or
9 alternatively allowing him to finish his sentence at home as a condition of his supervised release,
10 contending that his conditions put him at a significant risk of severe complications or death
11 should he contract COVID-19 and that the § 3553(a) factors support his release.⁶ The
12 government opposes his request, arguing that Kroger does not have evidence that he actually has
13 COPD so no extraordinary and compelling reasons warrant his release, and that he has only
14 served a portion of his sentence.⁷

15 Discussion

16 The compassionate-release provision of 18 U.S.C. § 3582(c)(1)(A)(i), as amended by the
17 First Step Act of 2018, permits a sentencing judge to reduce a sentence based on "extraordinary
18 and compelling reasons" once the defendant has failed to get the Bureau of Prisons (BOP) to
19 bring such a motion on his behalf, or once 30 days have passed since the warden of the facility
20 where the defendant is held denies his request.⁸ The court must consider any applicable factors

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22 ⁵ ECF No. 183-1 at 2 (Ex. A to motion).

23 ⁶ ECF No. 183.

⁷ ECF No. 185 at 5–6.

⁸ 18 U.S.C. § 3582(c)(1)(A)(i).

1 under 18 U.S.C. § 3533(a) and whether a sentence reduction is “consistent with applicable policy
 2 statements issued by the Sentencing Commission.”⁹ This includes ensuring that the defendant
 3 “is not a danger to the safety of any other person or to the community.”¹⁰ The parties do not
 4 dispute that Kroger’s motion is ripe for review.¹¹

5 Kroger argues that because of his chronic obstructive pulmonary disease and his age, he
 6 is at a high risk for serious illness if he contracts COVID-19.¹² The CDC has confirmed that
 7 “[h]aving COPD . . . is known to increase [an individual’s] risk of severe illness from COVID-
 8 19” and recommends that individuals with COPD continue with current medications.”¹³ The
 9 government does not dispute the severity of COPD, but argues that Kroger’s subjective
 10 complaints of COPD, which arose months before he self-surrendered to prison, do not prove he
 11 has COPD.¹⁴ To support this argument, the government submits Kroger’s medical records,
 12 which it misreads as confirming its theory. During his initial examination, Kroger told medical
 13 staff that he suffered from COPD and used an inhaler for the condition.¹⁵ Though the initial
 14 record indicates that he had no history of COPD, relatively clear lung sounds, and denied

16 ⁹ *Id.*

17 ¹⁰ U.S.S.G. § 1B1.13(2).

18 ¹¹ ECF Nos. 183 at 10 (motion for compassionate release), 185 at 3 (response); *see* ECF Nos.
 183-2 (Ex. C to motion), 185-1 (Ex. A to response).

19 ¹² ECF No. 183 at 11. Although Kroger notes many ailments, his request is centered around his
 20 COPD and age. And because only his age and COPD have been recognized by the CDC as
 21 placing him at a greater risk for serious illness or death because of COVID-19, *People with
 Certain Medical Conditions*, CDC (Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>, I analyze whether only those
 22 conditions present extraordinary and compelling reasons to justify his release.

22 ¹³ *Certain Medical Conditions*, *supra* note 12.

23 ¹⁴ ECF No. 185.

¹⁵ ECF 184 at 2 (Ex. B to motion).

1 tobacco use, medical staff prescribed Kroger an albuterol inhaler to use daily, and ordered a
 2 chest x-ray to examine his respiratory ailments.¹⁶ Dr. Farhad Khorashadi reviewed Kroger's x-
 3 ray and confirmed that it was consistent with COPD.¹⁷ Dr. Khorashadi noted that it showed
 4 "hyperinflation of the lungs with some basilar mild scarring changes [and f]lattening of the
 5 hemidiaphragm," which Kroger argues occurs in individuals with COPD.¹⁸ The government
 6 challenges this finding, because the report also notes that the x-ray was "normal" and did not
 7 show acute cardiopulmonary disease. But it fails to articulate how this finding is inconsistent
 8 with Kroger's COPD diagnosis, which as a chronic illness, would likely not be characterized as
 9 an "acute" cardiopulmonary disease. Thus, Kroger has shown that he has COPD that puts him at
 10 a higher risk of serious illness or death if he contracts COVID-19.

11 Kroger also argues that his risk of serious illness or death is compounded by the BOP's
 12 inability to keep him safe from the virus. He contends that the BOP only screens inmates and
 13 does not actually test them for the virus.¹⁹ Kroger maintains that the number of cases is rapidly
 14 growing in prisons, proving that they cannot contain the spread of the virus. Though I do not

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 16 ¹⁶ *Id.* at 3. To support his motion, Kroger filed his medical records under seal but did not comply
 17 with Local Rule IA 10-5, which requires that a party must move for leave to file those documents
 18 under seal. *See* ECF Nos. 184, 191. But because Kroger's medical privacy is a compelling
 19 reason to seal the records that he relies on in his motion, I do not unseal them. *Kamakana v. City*
 20 *& Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). Counsel is advised to consult the
 21 local rules and file the appropriate motion before filing any additional documents under seal.
 22 L.R. IA 10-5.

19 ¹⁷ ECF No. 187 at 48.

20 ¹⁸ *See* ECF No. 190 at 5 (citing Eric J. Olson, *Hyperinflated Lungs: What Does It Mean?*, Mayo
 21 Clinic (Nov. 30, 2017), [https://www.mayoclinic.org/diseases-conditions/emphysema/expert-](https://www.mayoclinic.org/diseases-conditions/emphysema/expert-answers/hyperinflated-lungs/faq-20058169)
 22 [answers/hyperinflated-lungs/faq-20058169](https://www.mayoclinic.org/diseases-conditions/emphysema/expert-answers/hyperinflated-lungs/faq-20058169) ("Hyperinflated lungs are often seen in people with
 23 chronic obstructive pulmonary disease"); Jon Johnson, *Does COPD Show Up on an X-ray?*,
 Medical News Today (Oct. 17, 2018), <https://www.medicalnewstoday.com/articles/323363>
 (noting that hyperinflation and a flattened diaphragm are common in chest x-rays of individuals
 with COPD).

¹⁹ ECF No. 183 at 13–18.

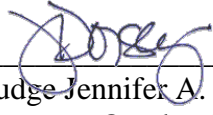
1 find the government's disagreement with Kroger's COPD diagnosis compelling, the concern
2 Kroger posed when he filed this motion in June has been largely minimized by the numbers of
3 COVID-19 cases that FCI Mendota has seen. Of the less than one thousand total inmates there,
4 only six inmates have had the virus—three are currently infected, and fortunately, zero have
5 died.²⁰ These numbers offer a promising sign that FCI Mendota's mitigation efforts are not
6 ineffective as Kroger predicted. Kroger's argument that an influx of COVID-19 patients would
7 make it unlikely that the prison could adequately treat his COPD is similarly unpersuasive
8 because he has not shown that the prison in any way has failed to care for his conditions. As he
9 notes, the prison fills his prescription for an albuterol inhaler to treat his COPD monthly.²¹ And
10 although Kroger indicates that his conditions of imprisonment are now more severe due to the
11 precautions the BOP is implementing, this alone is not a compelling or extraordinary reason to
12 justify his release. So I do not find that Kroger has demonstrated extraordinary and compelling
13 reasons for compassionate release.

14 Even if I were to find that Kroger's conditions are extraordinary and compelling
15 circumstances that warrant his release, I would still deny his request because the short time that
16 he has served of his sentence weighs heavily against his early release. Kroger has served less
17 than half of his 20-month prison sentence. At his sentencing, I considered his lack of criminal
18 history, his age, and his full compliance for six years on pretrial release. I also considered that
19 his offense was non-violent. But although Kroger pled guilty to a non-violent offense, his
20 actions were not without serious impact on the community. As I noted at his sentencing, the
21 crime for which he was sentenced involved a well-orchestrated and executed scheme that

22 ²⁰ *COVID-19 Cases*, Bureau of Prisons, <https://www.bop.gov/coronavirus/> (last visited Oct. 7,
23 2020).

²¹ ECF No. 190 at 5–6.

1 IT IS FURTHER ORDERED that the Government's unopposed motion to file Kroger's
2 medical records under seal [ECF No. 186] is **GRANTED**. The Clerk of Court is directed to
3 maintain the seal on ECF Nos. 184, 187, and 191.

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U.S. District Judge Jennifer A. Dorsey
October 7, 2020
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